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Some Influences of Justice Holmes' Thought on Current Law--Contracts with the United States--Suits against the United States

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SOME INFLUENCES OF JUSTICE HOLMES' THOUGHT ON CURRENT LAW—CONTRACTS WITH THE UNITED STATES—SUITS AGAINST THE UNITED STATES.

By Perlie P. Fallon*

CONTRACTS WITH THE UNITED STATES

THE CASES in which Justice Holmes wrote opinions in this field of law for the United States Supreme Court may be generally classified as follows:

(1) The effect of Congressional authorizations;

(2) The bases of construction;

(3) The controling elements of public policy and their relation to construction.

(4) The constitutional power to exercise control over performance by statute.

(5) Mistake of fact in transactions with the United States.

Effect of Congressional Authorization

In *Goodyear Co. v. United States*[1] the petitioner's predecessor had leased premises in Cincinnati to the United States for use of the Veteran's Bureau. The lease was made in 1921 for a term ending in 1926 at a stipulated annual rental payable in monthly installments. No appropriation was available to pay the rent after the fiscal year ending June 30th., 1922. The lease stipulated that if an appropriation was not made for payment of the rent for any succeeding fiscal year the lease would terminate as of June 30th. of the year for which an appropriation was last available. The Veteran's Bureau gave notice it wished to give up the lease as of June 30th., 1923, and would not pay rent beyond the period of actual occupancy, although an appropriation had been made to cover the fiscal year ending June 30, 1924. Possession was continued to December 20, 1923 when the premises were vacated and the rent paid to December 31, 1923. The petitioner claimed for the rent to June 30th., 1924. It was held that under Secs. 3732 and

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[1] (1928) 276 U. S. 287, 48 S. C. 306, 72 L. E. 575.

3679 of the Revised Statutes[2] in the absence of appropriation running beyond the fiscal year, the lease could only be binding on the United States by an appropriation and action by officers of the United States affirmatively continuing the lease. Here the lease had not been so continued beyond the period of occupancy. Justice Holmes disagreed, saying that the officers' statement was merely a refusal to accept the legal consequence of the action since under the local law the lease was renewed for a year and the appropriation was sufficient. The point which he made here did not rest on contract implied in law but on the construction of the statute. The statute made the contract binding where there was an appropriation, which there was, and the affirmative act of the officers in holding over when viewed in relation to the local law was an act continuing the lease to the end of the current fiscal year.

Bases of Construction

In the construction of contracts with the United States Justice Holmes has emphasized two rules of law. First, the Government was entitled to the benefit of the contract as it was made. Second, where services and benefits were delivered to the government on the basis of the contract made and compensation under the contract paid and accepted a rule of *quantam valebat* would not be applied to secure more by way of contract construction. The decisive factor in applying both of these rules was the construction which the parties had placed on the contract while it was in process of execution. This last approach brings out the *quantum valebat* nature of a claim when the construction of the contract as claimed and the actions taken under it are brought into contrast.

In *St. Louis Hay and Grain Co. v. United States*[3] a quartermaster had advertised for hay for use in a military camp. The right to increase or decrease the quantities, not exceeding twenty per cent, was reserved and also "if the troops should be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction." The hay was not taken "to begin within five days from the date of award, and proceed at daily rates of at least one-sixtieth of amount" as the delivery clause provided, but "in such quantities and at such times afterwards, as may be designated by the chief quarter-master" which was a further limitation in the contract and deliveries had proceeded on a rising market

[2]Now 41 U. S. C. A. Sec. 11; 31 U. S. C. A. Sec. 665.
[3](1903) 191 U. S. 159, 24 S. C. 47, 48 L. E. 130.

until all but 255,291 pounds had been delivered out of the 9,000,000 specified. Payment had been made and accepted. The delay was made the basis of a claim. The claim was held without merit in view of the right to make changes expressly reserved in the contract. In *Simpson v. United States*[4] the Commissary General of Subsistence had made a contract by which the claimant had agreed to deliver beef to the commissaries of troops stationed at posts and camps "in the interior of the island of Cuba:" Damages for refusal to take beef for troops at Los Quenados, Havana, and Matanzas were refused as flying in the face of the contract "which confines the undertaking of the United States to beef for camps in the interior." Conversations before the contract was made, and an occasional supplying of beef at Los Quenados, where another contractor had a plant which was notice "on the face of the earth," did not change the result. In *Chesapeake and Potomac Telephone Company v. United States*[5] an unusually large and expensive switch board installed for the purpose of performing a contract to furnish telephone equipment and service to the War Department was held to be within the contract and not subject to a claim for the cost of installation less salvage. The most notable of these series of cases is *Atlantic Gulf and Pacific Company v. Philippine Islands.*[6] A contract had been made for the extension to the Luneta of the City of Manila. The contract expressly stated that the contractor would be responsible for damages to the bulkhead by wave action but the Government would pay for repairs if a break was caused by pressure resulting from mud-fill. On May 1st, 1906, the mud-fill caused about 200 feet of the bulkhead to give way and a large quantity of the fill escaped into the bay. On May 18th., before repairs could be made, a typhoon occurred and about 1800 feet of the bulkhead was destroyed by the wind and wave action and the escaped fill. If the prior break had not happened no damage would have been done by the typhoon. Justice Holmes gave the Government the exact benefit of the contract made. There was no issue of tort. To what extent did the Government assume the risk? The contractor must offer the completed work. The ulterior consequence of the break rested on it.

In all of these cases the point is emphasized also that proceedings in discharge of the contract had gone forward on the basis of the contract—the test of the action of the parties as a determina-

[4](1905) 199 U. S. 397, 26 S. C. 54, 50 L. E. 245.
[5](1930) 281 U. S. 385, 50 S. C. 343, 74 L. E. 921.
[6](1910) 219 U. S. 17, 31 S. C. 138, 55 L. E. 70.

tion of construction. In *St. Louis Hay and Grain Co. v. United States, supra,* the contract was held by the lower court to be invalid since it was not reduced to writing pursuant to Section 3744 of the Revised Statutes.[7] But Justice Holmes said that since the contract had been performed its invalidity was now immaterial. In *Simpson v. United States, supra,* indefinite oral agreements and interpretations after the event gave way to "contemporary construction by men on the spot."[8] In *Chesapeake and Potomac Telephone Company v. United States, supra,* the contract was held to prevail over expressions of dissatisfaction by the contractor. The point respecting performance is brought out sharply in *New York, New Haven and Hartford Railway Company v. United States.*[9] A large quantity of gold had been offered for transport as fourth class mail matter at parcel-post rates by the Treasury Department. The appellant had rendered the service and been paid and accepted the sums covered by its contract with the Post-office Department. It argued this was not "mail service." Justice Holmes wrote that, whether it was mail service or not, it had been rendered and paid for without protest.

On these construction issues there is a reflection of Justice Holmes' attitude in Justice Murphy's opinion in *United States v. Blair.*[10] A contractor sought to finish the construction of buildings for the Veteran's Administration in 314 days under a contract by which he was allowed 420 days. He alleged he had been delayed by the failure of a concurrent contractor to proceed promptly with plumbing, heating and electrical work and the failure of the Government to either get this work done or terminate the contract. A further ground of claim was based on unauthorized acts, rulings and instructions of the Government Superintendent and his assistant. The first ground of the claim was rejected because there was nothing in the contract by which the Government had assumed an obligation to aid in the completion of the contract prior to the time agreed. The second was rejected because the administrative appeals provided by the contract had not been taken. Justice Holmes had consistently refused to go one inch beyond the contract terms in order to fix a liability upon the United States. The second ground of the decision in the *Blair* case is more fully stated in *United States v. Callahan Walker Co.*[11] namely,

[7] Formerly 41 U. S. C. A. Sec. 16, repealed Oct. 21, 1941.
[8] Page 400 of 199 U. S. See footnote 4.
[9] (1922) 258 U. S. 32, 42 S. C. 209, 66 L. E. 448.
[10] (1944) 321 U. S. 730, 64 S. C. 820, 88 L. E. 1039.
[11] (1942) 317 U. S. 56, 63 S. C. 113, 87 L. E. 49.

that questions of fact such as the cost of digging, moving and placing earth and a reasonable and customary allowance of profit are enquiries of fact and more easily ascertainable by administrative procedures. In *United States v. Rice,*[12] there also were concurrent contracts for building and installation of plumbing, heating and electrical equipment. The contractor doing the latter work was delayed by reason of subsurface difficulties encountered by the building contractor. There was enough in the contract to show the Government had reserved the right to interrupt the work and even to suspend construction, if it were deemed necessary. The claim for breach of contract was held without merit in the general law. The special clauses of the contract were construed to give the contractor an extension of the time of performance and not to create a basis of additional payment. There is also found in *United States v. Brooks-Callaway Co.*[13] a reflection of Holmes' approach in *Atlantic Gulf and Pacific Company v. Philippine Islands.*[14] There the Standard Form of Government Construction Contract was construed. Delay had been caused in the completion of a contract for the construction of levees on the Mississippi River. The delay had been due to high water. Article 9 of the contract relieved the contractor from liquidated damages caused by delays due to unforseeable causes beyond his control and without his fault or negligence and a specifying provision included "floods." The United States had deducted damages for the delay and the contractor sought to recover. It was held that the clause related to the unexpected and therefore there must be a finding of fact that the high waters were not forseeable. The contractor as in the *Philippine Islands* case was held to have assumed in the contract all which was not expressly excused.

In *United States v. Bethlehem Steel Corp.*[15] the contract was so clear that it was hardly open to construction. So it has no place in this part of my paper. It may be necessary to keep it in mind when Justice Holmes' attitude on the powers of United States' officers in relation to contracts and issues of public policy are considered.

[12](1942) 317 U. S. 61, 63 S. C. 120, 87 L. E. 53.
[13](1943) 318 U. S. 120, 63 S. C. 474, 87 L. Ed. 653.
[14]See footnote 6.
[15](1942) 315 U. S. 289, 62 S. C. 581, 86 L. E. 855. At the other pole of *United States v. Bethlehem Steel Corp.* since it involves fraud by the use of collusive bidding is *United States ex rel. Marcus v. Hess,* (1943) 317 U. S. 537, 63 S. C. 379, 87 L. E. 443. There an informer was permitted to recover in a qui tam suit double damages and fixed penalties under 31 U. S. C. Secs. 231-234.

Public Policy Factors

Justice Holmes' greatest contribution in this field of the law was that of stating the controling elements of public policy which govern contracts with the United States and the relation of that public policy to questions arising in the construction of such contracts.

Hazelton v. Shecels[16] was an action for specific performance of a contract to sell for $9,000 land respecting which legislation was pending for its acquisition as a hall of records. The recital of consideration set out services in bringing the property to the attention of the committees of Congress as a suitable and appropriate site for a hall of records and the expenditure of time, labor, and money in such services including drawing a legislative bill for the purchase or condemnation of the land. The land had been sold to the Government for $14,395.30. In dismissing the bill, Justice Holmes pointed out that the services were an essential part of the consideration. The offer invited and tended to induce improper solicitations. The objection to them rested in their tendency and not what was done in a particular case. If part of the consideration was contrary to public policy the whole promise falls. The public policy which Holmes had in mind here no doubt rested on the basis of duty, a concept which is a little short of fiduciary relation. In the presence of such a concept the law does not wait for actual fraud but raises the theory of constructive fraud. This involves not the will or motive of the actor but a gain or a detriment flowing from the failure to observe the express or implied obligations which arise from the surrounding circumstances.

In *United States v. New York and Porto Rico Steamship Company*[17] and *Acherland v. United States*[18] he declared that the purpose of Rev. Stats., Sec. 3744[19] which made it the duty of the Secretaries of War, the Navy and the Interior to cause every contract made by their authority on behalf of the Government "to be reduced to writing, and signed by the contracting parties with their names at the end thereof" was to prevent possible frauds upon the Government by officers. In the former case

[16] (1906) 202 U. S. 71, 25 S. C. 567, 50 L. E. 939. See *Muchany v. United States*, (1945) 324 U. S. 49, 65 S. C. 442, 89 L. E. 492, where option contracts for the sale of land to the United States were held valid in which a soliciting agent appointed by the War Department was paid a 5% fee based on the sum paid by the United States and such fee to be paid by the vendor.

[17] (1915) 239 U. S. 88, 36 S. C. 41, 60 L. E. 161.

[18] (1916) 240 U. S. 531, 36 S. C. 438, 60 L. E. 783.

[19] Formerly 41 U. S. C. A. Sec. 16, repealed Oct. 21, 1941.

he wrote for the Court in holding a shipping contractor liable for failure to perform tenders which he had accepted for the transportation of coal. The argument made was that the contract was not binding on the shipping contractor because not in conformity with the statute. It was rejected. In the latter case the court permitted reformation of a contract relating to the transportation of coal where a clause which the parties had agreed to delete was by mistake carried into the formal contract.

Constitutional Power Over Performance

In *Ellis v. United States,*[20] there was an indictment for violation of the Act of August 1, 1892, C. 352, 27 Stat. 340[21] relating to the limitation of hours of service of laborers and mechanics employed upon public works of the United States. The contractors had been found guilty of working employees who were within the statute more than eight hours in a calendar day and in absence of an extraordinary emergency. The argument that the Government had waived its sovereignty by making the contract and that a breach of the statute could only be a breach of the contract was dismissed as a mere confusion of ideas. Justice Holmes stated that by making a contract the Government did not give up its power to make a law consistent with its views of public policy and punish a departure. This dual character of the Government has been recognized in the more recent cases involving the inclusion or exclusion of Federal taxes affecting materials contracted for by Government agencies. Thus in *United States v. Kansas Flour Corporation,*[22] it was held that a clause in a contract, whereby the price was to be "increased" or "decreased" if taxes were imposed on the processing of the flour, released the United States from paying that part of the contract price which offset such a tax when the collection of the tax was restrained by the courts because it was invalid. This right of adjustment, however, rests upon the contract terms as was pointed out in *United States v. Standard Rice Co.*[23] There the contract contained no provision for decrease of the price by reason of tax adjustments and it was held that the Government could not offset in its settlements the savings which arose by reason of the processing tax having been declared invalid.

Now we must return to an extension of the rule of *Ellis v.*

[20] (1906) 206 U. S. 246, 27 S. C. 600, 51 L. E. 1047.
[21] Now 40 U. S. C. A. Sec. 321.
[22] (1941) 314 U. S. 212, 62 S. C. 232, 86 L. E. 159.
[23] (1944) 323 U. S. 106, 65 S. C. 145, 89 L. E. 112.

United States[24] and a case where Justice Holmes pointed out that the Government has power in certain fields to fix the price at which material is to be supplied to it. In *Hollis v. Kutz*,[25] a bill in equity had been brought against the Public Utilities Commission of the District of Columbia by private consumers of gas for the purpose of having certain increases in the rates for gas to private consumers declared void. The point made was that the rates established were void as a matter of law because the rate to be charged to the United States and to the District remained the statutory rate of 70 cents and if the United States and the District had paid 90 cents the gas company would have received a return of six percent. Holmes declared that the notion that the Government could not make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument the District should be satisfied at any price that it might fix required no answer.

Mistake of Fact

In the field of mistake of fact in dealings with the United States Justice Holmes wrote but one opinion. In *United States v. National Exchange Bank*,[26] the United States sued to recover the difference between the amount to which a check paid by it had been fraudulently raised and the amount for which the check was drawn. The check had been drawn upon the Treasurer of the United States by the United States Veteran's Bureau in favor of one Beck for $47.50. It had been raised to $4750 and paid by the Treasurer in that amount. Holmes wrote that the ground of recovery for a mistake of fact is that the fact supposed was the conventional basis or tacit condition of the transaction. He held therefore that in paying an order on itself the United States had notice of the amount and in paying an innocent holder it dealt at arms length and took the risk. The largeness of the business did not change the rule. If the drawee's name had been forged the rule would have been different as was pointed out in *Clearfield Trust Co. v. United States*.[27]

[24] See footnote 19.

[25] (1921) 255 U. S. 452, 41 S. C. 371, 65 L. E. 727. See also *United States v. Cowden Mfg. Co.*, (1941) 312 U. S. 34, 61 S. C. 411, 85 L. E. 497; where it was held that the taxes did not directly apply to the contractor.

[26] (1926) 270 U. S. 527, 46 S. C. 388, 70 L. E. 717.

[27] (1943) 318 U. S. 363, 63 S. C. 573, 87 L. E. 838. See also *Metropolitan Bank v. United States*, (1945) 323 U. S. 454, 65 S. C. 354, 89 L. E. 386, where the checks were fraudulently issued by a civilian clerk in the Paymaster's office of the Marine Corp. The United States recovered upon the basis of the guaranty of the indorsements.

SUITS AGAINST THE UNITED STATES

Here I have become involved in the matter of drawing lines. Some of Justice Holmes' cases which I shall place here might have been put under my first heading. The only justification I can make is that lines are sometimes necessary and when you have lines there are always some cases which are so close to the line that it seems a matter of discretion only where to place them. However, I feel that it is necessary to place the cases now to be discussed in a separate group because factually they depend upon situations where (1) there is an issue as to whether the United States is the real party in interest within the rule that forbids suits against a sovereign without its consent; and (2) the obligations involved are implied. The latter probably fall within the broader scope of the law of contracts but at least stand separate to the extent that express obligation is lacking and the claim can only be supported on an obligation implied from law or fact.

I shall take the groups in the order which I have stated them and note first those cases which are concerned with the rule that a sovereign may not be sued without its consent. The broad rule itself is not so often involved in the cases in which Justice Holmes wrote opinions but most often the application of the rule and the implications which arise from the rule as a matter of law.

In *International Supply Co. v. Bruce*[28] the owner of letters patent for a cancelling and postmarking machine brought a bill in equity to restrain the postmaster at Syracuse, New York, from using machines alleged to infringe the complainant's patents. The machines were used by the defendant's subordinates in the service of the United States. Holmes wrote that although the United States was a lessee and not an owner of the machines it had a right to their use which was a right *in rem* and this right could not be interfered with behind its back and it could not be made a party to the suit. There are recent cases which apply in different circumstances the law which he stated in the *Bruce* case. Thus in *Yearsley v. W. A. Ross Construction Co.*[29] an action for damages was brought in the Nebraska courts against a contractor of the United States on the ground that in the course of the work done pursuant to a contract with the United States and directed to the improvement of the Missouri River artificial erosion had been created which washed away a part of the plaintiff's land. Since

[28] (1904) 194 U. S. 601, 24 S. C. 820, 48 L. E. 1134.

[29] (1940) 309 U. S. 18, 60 S. C. 413, 84 L. E. 554. See also *Tennessee Power Co. v. T. V. A.*, (1939) 306 U. S. 118, 137, 59 S. C. 366, 83 L. E. 453.

the work was done by power validly conferred on the contractor it was held that the action would not lie. The taking of the property raised a different issue. In *United States v. Griffen*[30] it was held that a suit against the Interstate Commerce Commission under the Urgent Deficiencies Act of October 22, 1913 (now 28 U. S. C. A. Sec. 41, subd. (28)), granting the District Courts jurisdiction to review orders of the Interstate Commerce Commission, for the purpose of reviewing an order fixing rates respecting compensation for carrying mails, would not lie, since it was in the final analysis a suit against the United States. This case is also interesting because it follows the view that the United States may limit review of its contract arrangements to an administrative review, a position previously announced in *Dismuke v. United States*.[31]

In *Sage v. United States*[32] Holmes dealt with the nature of a suit against a collector of Internal Revenue for refund of United States taxes. A tax had been levied and collected upon the passing of certain legacies. Later it was held that such legacies were not within the terms of the tax statute because they had not vested. A claim for refund was filed and denied and later prosecuted to judgment against the Collector and satisfied by the United States. Subsequent decisions opened up certain of the legacies, which had been held taxable in the prior suit, to claims for refund. Suit was brought against the United States which pleaded the judgment against the Collector as a bar. Holmes held that although the United States had made statutory provisions respecting such claims (now 28, U. S. C. A. Sec. 842; 31 U. S. C. A. Sec. 725 q (6); 26 U. S. C. A. Sec. 3722) nevertheless the United States was not privy to such a suit and the resulting judgment was not a judgment against or in favor of the United States. Any claim against the United States arises from the subsequent official act and not from the judgment. The right to sue the Collector in a District Court rested on what is now 28 U. S. C. A. Sec. 41, Subd. (5). Suits against the United States go on a different footing. 28 U. S. C. A. Sec. 41 Subd. (20). After 1921 the jurisdiction of the District Court was opened up as to suits against the United States where the Collector was dead or out of office. The Court in defining these various jurisdictions in *Lowe Bros. Co. v. United States*[33] followed the rule laid down

[30] (1938) 303 U. S. 226, 58 S. C. 601, 82 L. E. 764.
[31] (1936) 297 U. S. 167, 56 S. Ct. 400, 80 L. Ed. 561.
[32] (1919) 250 U. S. 33, 39 S. C. 415, 63 L. E. 828.
[33] (1938) 304 U. S. 302, 58 S. C. 896, 82 L. E. 1362. See also *Graham & Foster v. Goodcell,* (1931) 282 U. S. 409, 430, 51 S. C. 186, 75 L. E. 415.

in the *Bruce* case that the suit against the Collector was personal and, carrying out that idea, held that the collection of the tax by the Collector was a *sine qua non* of jurisdiction. The crediting of an overpayment for 1918 to a 1917 deficiency was not enough.

A political form of recent development is governmental action on an extensive scale through corporations. Thus the Shipping Act of September 7, 1916, anticipating the possibility of war, established a Shipping Board and gave it power to form a corporation under the laws of the District of Columbia for the purchase, construction and operation of merchant vessels. The Board was authorized to purchase not less than a majority of the corporate stock. The corporation was formed and among its other actions made contracts for the building of sixteen wooden vessels by the Sloan Shipyards Corporation. Later the corporation changed its plans and terminated the contract. A suit for breach of contract and for the recission of a subsequent contract was filed in the United States District Court for the Western District of Washington. The claim was for more than $10,000 and the bill was dismissed on the ground that the suit must be brought in the Court of Claims. The theory on which this result was based was that the suit was one against the United States. *Sloan Shipyards v. United States Fleet Corporation,*[34] Holmes writing for a judgment of reversal refused to be influenced by "the enormous powers ultimately given to the Fleet Corporation." He declined to hold that the Fleet Corporation "was so far put in place of the sovereign as to share the immunity of the sovereign from suit." Such a notion he wrote "is a very dangerous departure from one of the first principles of our system of law" because "the general rule is that any person within the jurisdiction always is amenable to the law." He pointed out that the corporation under its charter was capable of suing and being sued. His opinion appears to me to go deeper than intention and to extend to the question of power. The argument advanced to support the Fleet Corporation's contention would have left inoperative the rule that a sovereign's agent must justify his acts. What we are witnessing here is a clash between differences of approach. Discussion of political and historical significances do not belong here since we are only concerned with questions of law. The dignity of the sovereign which was perhaps the ancient root of his immunity is necessarily a part of the legal fabric. Later, in 1939, the Reconstruction Finance Cor-

[34] (1922) 258 U. S. 549, 42 S. C. 386, 66 L. E. 762.

poration and its subsidiaries went so far as to claim immunity from suit in a case where damages were asked for negligence in discharging cattle feeding contracts. The immunity was denied. The reasoning is narrower than in the *Sloan Shipyards* case and proceeds upon the ground of Congressional intention.[35] The garnishment cases of which *Federal Land Bank v. Priddy*[36] and *Federal Housing Administration v. Burr*,[37] are examples also go on the ground of Congressional intention.

In *Olson v. United States Spruce Co.*[38] Justice Holmes pointed out that the Dent Act (Sec. 50 U. S. C. A. Sec. 80 p. 91), which gave the Court of Claims jurisdiction of certain claims against the United States, did not contemplate suits against corporations in the Court of Claims. The plaintiffs alleged they had devoted their logging camp to the production of airplane timber upon the assurances of agents of the United States that the latter would pay for what the plaintiffs had been requested to do. A claim under the Dent Act seems to have been filed earlier and to have been disallowed by the Secretary of War. The plaintiffs then brought this action against the intermediate contractor in a State court and it was removed to a District Court and dismissed for want of jurisdiction. Holmes reversed this result saying that there might be a cause of action on the merits and even if the Dent Act was a bar it would go to the merits rather than jurisdiction. He pointed out that the Dent Act did not contemplate suits against corporations in the Court of Claims. The law in this case comes out more clearly in *United States v. Sherwood*,[39] decided in 1941: There a judgment creditor in New York secured authority under Sec. 795 of the New York Civil Practice Act to sue the United States under the Tucker Act (28 U. S. C. A. Sec. 41 (20)) to recover damages for breach of a contract with the judgment debtor. The Circuit Court of Appeals reversed a dismissal on the ground the matter was controlled by the State law. The Supreme Court, on certiorari, reversed the Circuit Court of Appeals. It pointed out that jurisdiction in suits against the United States is generally vested in the Court of Claims. Title 28 U. S. C. A. Sec. 41 (20) created concurrent jurisdiction in the District Court of Claims not exceeding $10,000 in certain limited cases of contract and dam-

[35] (1939) *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 59 S. C. 516, 83 L. E. 784. *Tennessee Power Co. v. T. V. A.*, note 27, has a place here also.
[36] (1935) 295 U. S. 229, 55 S. C. 705, 79 L. E. 1408.
[37] (1940) 309 U. S. 242, 60 S. C. 488, 84 L. E. 724.
[38] (1925) 267 U. S. 462, 45 S. C. 357, 69 L. E. 738.
[39] (1941) 312 U. S. 584, 61 S. C. 767, 85 L. E. 1058.

ages not sounding in tort. The Court of Claims is a legislative and not a constitutional court and subject to such limitations as Congress may place upon it in granting the consent to a suit including dispensation with jury trials. The jurisdiction of the Court of Claims is restricted to the adjudication of suits brought against the Government alone. Here the validity of the plaintiff's right to the claim must be adjudicated in order to give complete relief. The District Court could exercise both of these jurisdictions. But the District Court had no more authority under the Tucker Act than to sit as a Court of Claims and the United States had not consented to be sued except where the issues were between the claimant and the Government. On the practical side the Government would be required to make sure the plaintiff had authority to relinquish the debtor's claim in so far as it exceeded $10,000 or be subjected to successive suits.

There are points at which different fields of law merge. The lines which mark them off become indistinct. Thus while we are not here concerned with the taxation of instrumentalities of the United States we come upon cases which might be classified either there or in the field of law we are now considering. This arises from the fact that some tax cases also raise the point that the citizen cannot sue the sovereign. In *Baltimore Shipbuilding Co. v. Baltimore*[40] certain land had formerly belonged to the United States which had conveyed it to the appellant. The condition of the deed was that a dry-dock be constructed on the property for the use of vessels belonging to the United States and if the land was diverted to any other use or the dock became unfit for use for a period of six months the property was to revert to the United States. The city of Baltimore laid a tax upon the appellant's interest. The tax was resisted on the ground it was beyond the taxing power of the state. Justice Holmes pointed out that there are different interests in land such as life estates and remainders. The tax in such cases could only be enforced against the interest concerned. Here there was a condition subsequent and the United States had no right *in rem*. The fee was in the appellant and any sale of the interest would be subject to the condition. Since the appellant was a private corporation for gain its employment by the United States was not within the instrumentality rule.[41]

The recent cases which have been concerned with this theory

[40] (1904) 195 U. S. 375, 25 S. C. 50, 49 L. E. 242.

[41] Cf. *Callam County v. United States* (1923) 263 U. S. 341, 44 S. C. 121, 68 L. E. 328.

of the law have presented the reverse situation to that with which Holmes dealt in the *Baltimore Shipbuilding Case.* Thus in *Mullen Benevolent Corp. v. United States,*[42] it was held that lands acquired by the United States which had been subject to local improvement assessments could not be reached for further assessments to make up deficiencies necessary to pay off the bonds issued (the outstanding assessments had been fixed on acquisition). In *Maricopa County v. Valley Bank*[43] it was held that shares of preferred stock of national banks held by the Reconstruction Finance Corporation were not subject to state taxation where Congress had provided otherwise by statute. The liens which had attached prior to the passage of the statute could not be enforced because the statute must be deemed a withdrawal of any consent to be sued. It is here that we reach the point where the different fields of law seem to merge in the single point of the immunity of the sovereign, and this situation is illustrated further by *United States v. Alabama* [44] where state taxes which had become a lien prior to the purchase of the property by the United States were held constitutionally valid but it was also held that they could not be enforced against the United States without its consent.

We now turn to a different aspect of sovereign liability, namely, how far, if at all, the United States opens itself to claims in the nature of counter-claims and offsets when it comes into court and asks for affirmative relief. The right to set up and have the benefit of offsets is established by statute where the Government voluntarily sues and the claim so offset has been presented to the General Accounting Office for examination and disallowed or such presentation excused within the grounds set out in the statute. 28 U. S. C. A. Sec. 774. *United States v. Wilkins*[45] indicates that the statute includes credits arising out of any transaction as well as credits arising out of the transaction in suit.

The case in which Justice Holmes wrote on this matter is *United States v. The Thekla.*[46] It raised a different issue than the situation covered by the statute. It went to the question of how far an affirmative recovery could be made over and above setoff. It presented a particular situation since it arose under the admiralty law. The owners of the steamship F. J. Luchenbach libelled the

[42] (1933) 290 U. S. 89, 54 S. C. 38, 78 L. E. 192.
[43] (1943) 318 U. S. 357, 63 S. C. 587, 87 L. E. 834.
[44] (1941) 313 U. S. 274, 61 S. C. 1011, 85 L. E. 1327.
[45] (1821) 6 Wheat. 135, 144; 5 L. E. 225.
[46] (1924) 266 U. S. 328, 45 S. C. 112, 69 L. E. 313.

barque Thekla. The latter filed a cross libel and the proceedings were consolidated. The United States came in upon its own motion and stood on the steamship's libel. It filed a claim "without submitting itself to the jurisdiction of the court" and alleged possession and ownership of the steamship at the time when the libel was filed. The Fleet Corporation filed a stipulation reciting that the steamship was under requisition charter to the United States and in possession of the United States at the time of the collision; that if there was any liability it was that of the United States and the Fleet Corporation agreed in case of default by the claimant that execution should issue against its chattels and lands in the sum of $130,000. At the trial it was found that the steamship alone was at fault and a decree was made against the claimant and stipulator for the damages in the sum of $120,619.71. One of the grounds relied upon by the Government was that a claim that would not constitute a cause of action against the Government could not be asserted as a counterclaim. Here there was something more than offset because the steamship being found alone at fault was under the admiralty law required to bear the entire damage which meant the awarding of an affirmative claim regardless of any rule of offset. Justice Holmes decided this part of the case on the point that the submission of the United States was an agreement by implication that justice should be done with regard to the subject matter pursuant to admiralty law. The libel, he wrote, was like a bill for an account and imported an offer to pay the balance if it should turn out against the party bringing the bill.

The Court in recent cases has limited the rule in *The Thekla* case to the admiralty basis on which it rests. Thus in the *United States v. Shaw*[47] it was held that the probate court in Michigan, acting under the established state practice respecting administration of estates, could not allow a cross claim against the United States in excess of setoff. The United States had not consented to the prosecution of a suit against it in the Probate Court by the filing of the claim against the estate. The same rule was applied in *United States v. United States Fidelity and Guaranty Co.*[48] There the United States had filed a claim on behalf of its Indian wards. It was held that the filing of the claim did not authorize the allowance of the debtor's cross claim in a larger amount and the fixing of a credit against the United States. The action in thus allowing the credit was not *res judicata* in a subsequent litigation.

[47](1940) 309 U. S. 495, 60 S. C. 640, 84 L. E. 881.
[48](1940) 309 U. S. 506, 60 S. C. 653, 84 L. E. 894.

We may well doubt if Justice Holmes would have decided the two cases last discussed differently and thus gone beyond the admiralty basis on which *The Thekla* rests. The reason of our doubt rests in the disposition he made of questions relating to the allowance of interest in situations such as *The Thekla* presented. In *The Thekla Case* interest was allowed. But in *Boston Sand and Gravel Company v. United States*[49] and *United States v. Commonwealth Line,*[50] where special statutes created jurisdiction and permitted suit where collisions occurred between United States ships and other vessels and created authority to enter a decree for damages and costs, he refused to construe the statute so as to allow interest on a recovery against the United States. The United Staes was held liable only in so far as it had expressly committed itself to pay and to waive the bar against suit.

Finally we come to the second division of suits against the United States, namely, suits upon implied contracts. Earlier in this paper I have referred to the necessity of drawing lines in the division of the subjects dealt with in this paper. It seems that some of Justice Holmes' opinions which I have classified in this second division of the paper might well have been placed in the first division. Now that we have examined the matter further the arrangement appears justified because the cases which are to be described now are not contracts with the United States but liabilities claimed to rest on the United States and they fall within the shadow of the rule that the sovereign cannot be sued without its consent and may not be charged with liabilities which it has not assumed. Justice Holmes made this distinction clear in *Alabama v. United States.*[51] There Alabama brought suit in the Court of Claims to recover from the United States a tax imposed by the law of the state upon the privilege of manufacturing and selling hydro-electric power, and for interest thereon and a penalty for failure to pay. The transaction involved was the sale of surplus power generated at Muscle Shoals. The petition was dismissed in the Court of Claims upon the merits. Justice Holmes wrote for affirmance but on the ground that the petition must be dismissed for want of jurisdiction. He pointed out that dismissal upon the merits implied jurisdiction to deal with the issues. This did not exist because the Court of Claims was limited by what is now 28 U. S. C. A. Sec. 250 subd. (1) to actual contracts and if implied they must be implied in fact and

[49] (1928) 278 U. S. 41, 49 S. C. 52, 73 L. E. 170.
[50] (1929) 278 U. S. 427, 49 S. C. 183, 73 L. E. 439.
[51] (1931) 282 U. S. 502, 51 S. C. 225, 75 L. E. 492.

not by fiction, "or as it is said, by law." He pointed out the distinction which exists respecting eminent domain where the United States takes title and is bound to compensation by the provisions of the Constitution. A tax, Holmes wrote, is not a matter or contract but a "unilateral act of superior power, not depending for its effect upon concurrence of the party taxed." The rule applied here is that the sovereign may not be sued without its consent. The converse of the rule is found in the recent case *Pope v. United States.*[52] There the United States, through Congress, after the contractors' claims had been rejected by the Court of Claims under the existing law, assumed the liability by a special statute, and authorized suit in the Court of Claims and review by the Supreme Court. The rule applied in the *Pope* case is still that of *Alabama v. United States,* namely, an assumption of liability and a consent to suit upon it.

The other cases in which Holmes wrote opinions which I classify as belonging here are as follows: *American Smelting Co. v. United States*[53] holding that a contract for the delivery of copper at a fixed price is controlling over a claim for a higher price fixed by a War Agency at a later time and during the period of delivery. The obligation resting within the realm of assumed obligation cannot be replaced by an implied obligation arising out of a requisition power created by statute. *Mullen Benevolent Corp v. United States*[54] is perhaps applicable also here. *Morrisdale Coal Co. v. United States*[55] involved an act of the Fuel Administration in requistioning and diverting coal which was already covered by contract. It was held that the fact that it was sold at a lesser price than the price fixed by the contract did not make the United States liable for the difference in price on the ground of implied contract. "* * * no law-making power promises by implication to make good losses that may be incurred by obedience to its commands."[56] In *Pine Hill Co. v. United States*[57] it was held that the fixing of prices of coal and coke under the war powers which were alleged to be unjust and unreasonable and actually less than the cost of production did not create an implied contract of indemnity on the part of the United States nor under any construction of the statute granting the powers (act of Aug. 10, 1917 C. 53, Sec. 25, 40 Stat. 276, 284).

[52] (1944) 323 U. S. 1, 65 S. C. 16, 89 L. E. 5.
[53] (1922) 259 U. S. 75, 42 S. C. 420, 66 L. E. 833.
[54] See footnote 39.
[55] (1922) 259 U. S. 188, 42 S. C. 481, 66 L. E. 892.
[56] At p. 190 of 259 U. S. 188.
[57] (1922) 259 U. S. 191, 42 S. C. 482, 66 L. E. 894.

"A liability in any case is not to be imposed upon a government without clear words."[58] The facts in *United States Grain Corp. v. Phillips*[59] were as follows. Gold had been transported from Constantinople to New York on a navy destroyer. The appellant was a corporation of the United States under the control of the United States Food Administrator and was performing public functions. A naval commander was entitled to special compensation under the Naval Regulations for transporting gold. The gold was offered for shipment outside of the Regulations and the Navy Department directed that it be so received. No implied obligation arose. The work was done in the line of duty and the gold was the property of an agency of the United States. The recent case of *United States v. Beuttas*[60] is perhaps within the lines of the rule Justice Holmes laid down in the cases I have last described. In it the contractor sought to recover on the ground that the subsequent letting of contracts on adjacent work allowing for higher wages to employees had compelled an increase to the contractors' employees. An allowance made by the Court of Claims was reversed.

Conclusion

In recent years contracts with the United States have become largely administrative matters. "Termination" has a new and separate significance. "Renegotiation" has created a new field of quasi-legal activity. Yet administration law is not at all a means which has recently been discovered. It is perhaps more correct to say that in our time it has become more widely extended and used to supplant other law forms. There is also little originality or even purposeful direction in this newer extension of its use. It has perhaps been a by-product of the vast commercial and industrial activities which now accompany modern wars and which have turned nations "for the duration" into vast socialisms imitative of the ant hill and the bee hive. Justice Holmes saw the beginning but not the full development of this modern phenomenon. In *Sloan Shipyards v. United States Fleet Corporation*[61] we find one of those intuitive reactions to changing conditions of which there are several in his judicial work. He could not reconcile vast commercial activities with the ancient dignity from which the sovereign's immunity had emerged. He did not feel free to give a loose rein in such conditions. Neither

[58] At p. 196 of 259 U. S. 191.
[59] (1923) 261 U. S. 106, 43 S. C. 283, 67 L. E. 552.
[60] (1945) 324 U. S. 768, 65 S. C. 1000; 89 L. E. 921.
[61] See footnote 31.

did he attempt to trace the giant oaks to their remote acorns. He found rather a cultural conflict in the ideas presented. It is one of those places where instinct and not learning becomes the criterion of the man. I doubt if Justice Holmes ever was of the opinion that in the matter of contracts the United States must be treated like any other contractor. In many places he suggests expressly and by implication that the Government does not have the same advantages in making contracts as private persons. I would point also to the idea of "public policy" which appears often in his opinions and which is perhaps best rationalized under the idea of a duty and the legal doctrine of constructive trust.

The adventures of the barque Thekla in the Courts display one of those rare bits of artistry in the law which only an all around workman can achieve. There is a subtle touch and a fairy like balancing of the traditions of different fields of the law and the final arrangement and coordination of them all in a magic web which is a source of both wonder and despair.